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IN THE

Supreme Court of the United States

..... TERM, 1958

No. 996

ANN WARNER,
Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 3, 1958.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at page 1A is appended hereto as Appendix A. The District Court rendered its opinion in this cause, which is reported at 154 F. Supp. 362.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 3, 1958, and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Was an issue of fact created by the pleadings, depositions and affidavits in this case so that defendant-appellees' motion for summary judgment should be denied.

RULES INVOLVED

Rule 56, SUMMARY JUDGMENT:

> "(c) Motion and Proceedings Thereon. • • • The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. • • •"

STATEMENT OF THE CASE

The petitioner, plaintiff-appellant, Ann Warner, sued Leo and Eleanor Lieberman, defendants-appellees, for damages occasioned by the alleged negligence of the defendants in the care and maintenance of a chaise longue chair owned by the defendants, and which was on their premises. Defendants-appellees were the hosts, and petitioner was their guest. The defendants-appellees brought a motion for summary judgment and the District Court sustained defendants' motion for summary judgment, and an order and judgment was filed, which judgment provided that the complaint of the plaintiff and the action of said plaintiff were dismissed on the merits, from which an appeal was duly taken to the Circuit Court of Appeals. Error is charged in the granting of the motion for summary judgment, which in considering said motion the District Court had before it the pleadings, various depositions and affidavits.

Petitioner was a gratuitous house guest of the defendants (App. 18, 36).* Petitioner arrived at the home of the defendants on July 1, 1956 from California (App. 17, 36). On July 12, 1956, petitioner sustained the injuries for which she brought this suit (App. 17, 36). Petitioner had been seated for about a minute on the chair portion of a chaise longue chair in the yard of the defendants. The defendant, Leo Lieberman, was grilling steaks. The defendant, Eleanor Lieberman, was in the house (App. 19, 26). The chaise longue chair in question had never previously been used by the petitioner (App. 18, 27, 37). Petitioner had seen it but did not observe anything wrong with it (App. 21, 25, 28, 37). The back of the chair portion of the chaise longue was toward the south and the footstool portion was to the north. Petitioner was facing west with her back toward the home of the defendants.

*References "App. . . . " are to the printed appendix to appellant's brief in the Court of Appeals, which has been certified and filed in this Court.

Petitioner sat on the chaise longue chair for a short period of time and then heard her brother, the defendant, Leo Lieberman, call for her to come and eat. The portion of the chaise longue chair, where one sits, is considerably lower than the average chair, and in order to get up one has to push on the edge of the longue in order to get the body up (App. 19, 25, 37). Petitioner pushed herself up and walked toward the front of the chaise longue, or to the north. She had taken only a step, or two, when she fell. Her right foot became entangled in the leg of the chaise longue which was loose and not fastened, and which apparently was pushed to the west and north in a counter-clockwise manner as she got off the chaise longue (App. 28). As petitioner sat on the chaise longue, she could not notice that the leg was loose (App. 20, 28, 37). The loose leg of the chaise longue chair swiveled in a clockwise direction and pulled away from the seat as she was walking around to the front and caught her right leg, tripping her (App. 29). She fell forward and hit the ground (App. 4, 19). At the time petitioner was seated on the chaise longue its leg was in a normal position (App. 20). In petitioner's affidavit, she sets forth that there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped (App. 20, 28).

The affidavit of Aaron Starobin, an attorney in the office of petitioner's attorney, states that he examined the chaise longue on August 20, 1957 at the residence of an agent of the insurance company for defendant; that there were a total of three screws missing from the stool portion of it; that originally the front legs were attached by four screws, two on each side, and that at the time of his examination, thirteen months after the injury, only one screw remained which was on the righthand side; that upon setting oneself

on that portion of the chaise longue known as the stool portion, one would not have knowledge that the longue was unsafe, as the legs had been pushed below it; that upon getting up and pushing the chaise longue to one side in order to assist in getting up, because of the low height of the longue, the metal legs attached to the stool portion of the chaise longue could be seen to swing out from the chair proper in a clockwise fashion and could easily cause one to trip, as one would not expect that (App. 35, 37).

The testimony of the defendant, Leo Lieberman, in his deposition, sets forth that during the winter prior to the accident, the chaise longue had been stored in the basement; that prior to storing it in the basement he had noticed the defective front legs with the bolts missing; that when he took it out in May or early June, the front portion of the leg was not fastened to the footstool portion of the chaise longue (App. 9); that the support should have been fastened to the footstool portion on the left side and the right side (App. 9); that the left front side was not fastened, and that a screw and bolt were missing (App. 9); that the defendant, Leo Lieberman, noticed that it needed fixing but that he had not fixed it (App. 9); that when he took it out in the spring, he again noticed that it was not working and that it required repair (App. 10). That if the defendant, Leo Lieberman, put the support underneath the frame, it would stay there and hold, but that it would not hold solid (App. 10). That if the footstool portion was pushed slightly, the support leg would come loose (App. 10). That the defendant, Leo Lieberman, knew that a person could fall on the leg that was loose and that it would move when a person was either about to sit on it or was in the process of getting up from it (App. 13). That the defendant, Leo Lieberman, knew that the

chaise longue chair, in the condition it was in at the time the petitioner was injured, was dangerous (App. 16). That the defendant never told petitioner that the chaise longue was defective, and that although defendant knew somebody could fall, he did not believe anybody would be badly hurt.

The affidavit of Eleanor Lieberman set forth that she knew there were several screws missing from the chaise longue in the summer of 1956 and prior to the accident. That she and the child of the defendants used the chaise longue during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the chaise longue before petitioner's accident (App. 26). That she did not see the leg of the chaise longue protruding beyond the front or side of the chaise longue before the accident, although she did see the leg of the chaise longue protrude after the accident when petitioner was entangled in the chaise longue. (App. 26). That prior to the accident, the defendant, Eleanor Lieberman, had used the chair carefully, being aware of its condition, and that she had never told the petitioner of its dangerous condition (App. 26, 27).

Jurisdiction was originally invoked in the United States District Court for the Eastern District of Wisconsin by virtue of diversity of citizenship. On September 19th, 1957, a judgment was entered in the United States District Court for the Eastern District of Wisconsin dismissing the complaint of the plaintiff and the above entitled action on the merits with costs. An appeal was taken to the Circuit Court of Appeals of the Seventh Circuit and the Circuit Court of Appeals affirmed the findings and judgment of the District Court. The judgment of the Circuit Court of Appeals was entered March 3, 1958.

ARGUMENT.

In deciding that there was no tryable issue of fact and affirming the decision of the District Court granting defendants-appellees' motion for summary judgment, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and, the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter of federal law; and said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Issues of negligence are ordinarily not susceptable of summary judgment but should be resolved for trial in the ordinary manner. *Aetna Ins. Co.* v. *Cooper Wells & Co.*, C. A. Mich. 1956, 234 F. 2d 342; 6 Moore's Federal Practice (2d Ed.) 2232, note 4 and cases cited.

Summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, should be temperately and cautiously used lest abuse reap nullification. *Avrick* v. *Rockmont Envelope Co.*, C.C.A. Colo. 1946, 155 F. 2d 568.

The trial court should be slow in granting a motion for summary judgment depriving a party of his right to trial by jury where there is a reasonable indication that a material fact is in dispute. *Begnaud* v. *White*, 6 Cir., 170 F. 2d 323, 327; *Estepp* v. *Norfolk & W. Ry. Co.*, 6 Cir. 192 F. 2d 889, 893; *Associated Press* v. *United States*, 326 U.S. 1, 65 S. Ct. 1416, 89 L. ed. 2013; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S. Ct. 724, 88 L. ed. 967; *Kam Koon Wan* v. *E. E. Black, Limited*, D.C. Hawaii, 1948, 75 F. Supp. 553.

The function of a motion for summary judgment is not to permit the court to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. *Pickle* v. *Trimmel*, D.C., 93 F. Supp. 823; *Ramsouer* v. *Midland Valley R. Co.*, 8 Cir. 135 F. 2d 101, 103; *Pierce* v. *Ford Motor Co.*, 4 Cir., 190 F. 2d 910, 915, 916; *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 8 Cir. 191 F. 2d 881, 883; *Toebelman* v. *Missouri, Kansas Pipe Line Co.*, C.C.A. Del. 1942, 130 F. 2d 1016; *American Optical Co.* v. *New Jersey Optical Co.*, D.C. Mass. 1944, 58 F. Supp. 601.

A court must accept plaintiff's fact allegations and statements in their affidavits and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them. Moore's Federal Practice, page 3184; *Sartor* v. *Arkansas Natural Gas*, 321 U.S. 620, 64 S. Ct. 724; *Friedman* v. *Washburn Co.*, 7 Cir., 145 F. 2d 715; *Campana Corp.* v. *Harrison*, 7 Cir., 135 F. 2d 334; *Furton* v. *City of Menasha*, C.C.A. Wis. 1945, 149 F. 2d 945, certiorari denied 66 S. Ct. 170, 326 U.S. 771, 90 L. ed. 466.

In controverting the rationale of the Court of Appeals in supporting the findings and judgment of the District Court, granting defendants-appellees' motion for summary judgment, it is necessary to analyze the substantive law of Wisconsin relative to a guest invited onto the premises of the host for social purposes, the meaning of active and passive negligence in the State of Wisconsin, the meaning of a trap in Wisconsin, and as to whether or not the matter of a trap is an issue of fact or can be determined by the court as a matter of law.

The substantive law of Wisconsin applies to this case.

In the case of *Greenfield* v. *Miller*, 173 Wis. 184; 180 N.W. 834, the general rule is set forth that where a guest is invited to come onto the premises of the host for social

purposes, the relation thus created is one of licensor and licensee, and the rule of ordinary care does not apply. This case further sets forth that there is no liability on the part of the licensor for injury sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap, which fact proximately caused the injuries, or the licensor was guilty of active negligence.

In the *Greenfield* case, reference is made to Bigelow Torts (8th Ed.) 160, 161, where it is stated:

> If a licensee is invited only as a guest or friendly visitor, or for benevolence, he enters on no better footing as far as the present question is concerned, than if he were a bare licensee; he can not hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware.

In the case of *O'Shea* v. *Lavoy*, 175 Wis. 456, 185 N.W. 525, the Court in discussing a trap, stated that a trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. Hence, it is the duty of the host to advise his guest of its presence, so that the guest may enjoy the premises in a security equal to that enjoyed by the host.

In Volume 63 C.J., page 803, a trap is defined as a concealed defect or hidden danger lurking upon the premises which may be avoided if known.

A case of interest which defines the meaning of both a trap and what constitutes active negligence is *Brindson* v. *Chicago & N.W. R. Co.*, 144 Wis. 614; 129 N.W. 664, where the plaintiff, a small boy, fell into a steam and hot water pit constructed by the defendant in a breakwater. The court, in commenting, stated that the opening or hole in the cover of the steam pit, as described in the evidence, was dangerous, seemed self-evident from its very nature

and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was obstructed by the steam arising therefrom through this hole and the cracks between the planks covering the pit. This condition of the planks made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them.

In the case of *Lehman* v. *Amsterdam Coffee Co.*, 146 Wis. 213; 131 N.W. 362, where the stairway was surrounded on two sides with piles of merchandise as high or higher than the rail and on one side by shelving, the court stated that the evidence seemed to be ample to show that in approaching it from the front of the store there would be no sign or indication of a stairway, and that only as one came practically to the opening itself from the east was it possible to see it, or anything suggesting the existence of an opening in the floor. The jury might, the court stated, well say from the evidence that it was a trap or snare of whose existence under the circumstances the rules of ordinary care would require that an invited person be warned.

The Court of Appeals, in the case at bar, in delving into the question as to whether or not a trap existed, stated that everything occurred in daylight, and that the protruding leg obviously was clearly apparent as petitioner walked toward it and was tripped thereby. The Court of Appeals further stated in its decision that the leg, at the time and just before petitioner tripped over it, was not hidden or lurking and was therefore not a trap.

The Court of Appeals in its decision further placed emphasis on the affidavit of Aaron Starobin, which affidavit in part set forth that the metal legs attached to the stool portion *could be seen* to swing out in a clockwise

fashion and could easily cause one to trip. (Emphasis by Court of Appeals).

Referring to the *Lehman* case, and by way of analogy, as the party in the *Lehman* case came upon said stairway, can it be said that said stairway was less obvious than the leg of the protruding chair in the case at bar, bearing in mind that in the case at bar, when petitioner sat down, the leg of the chaise longue was in normal position? Further, when petitioner got up from said chair, unbeknown to petitioner, the leg swiveled out, and petitioner fell only after she had taken a step or two. In standing up, it is not natural for a person to look at his feet, but to look straight ahead. *Duncan* v. *Grand Rapids*, 121 Wis. 626, 99 N.W. 317; *Smith* v. *Clayton Const. Co.*, 189 Wis. 91, 206 N.W. 67.

The Court of Appeals, in its decision, would imply that the second the leg of the chair swiveled around, it was open and obvious to petitioner. Although this might be the case relative to a person walking towards the chaise longue, it was not the case as to petitioner.

The word "trap" has often been used in cases, but this word is a figure of speech and not a formula, involving the idea of concealment and surprise from an appearance of safety under circumstances cloaking a reality of danger. In *Slade* v. *Battersea & P. Hospital Management Committee* (1955) 1 Week L. R. 207 (1955) 1 All Eng. 429.

It is petitioner's contention that whether or not the condition of the chaise longue chair and the leg of said chair which protruded as a result of the pressure of petitioner, which she exerted upon said chair as she was getting up, was a trap, is an issue of fact, and the Court of Appeals, in arguing that it was not a trap, was deciding an issue of fact, rather than determining whether there was an issue of fact.

In the case of *Jablonski* v. *Bay City*, 248 Mich. 306, 226 N.W. 865, where a pedestrian was tripped by a low sagging wire made virtually invisible by a light snow, the Court stated, the question whether the wire was a proper guard or a dangerous instrumentality would be for the jury.

In *Debes* v. *Morganroth*, 136 A. 2d 896 (N.J. App. Div. 1957) where plaintiff, a social guest, at defendant's cottage, opened a door and fell down a stairway, and plaintiff's evidence showed all doors in the foyer were indiscernible in shape and appearance, it was held that plaintiff's evidence raised a jury question on the host's negligence and the guest's contributory fault.

Two cases of interest relative to the duties of the host relative to the guest, and the meaning of a trap are *Malmquist* v. *Leeds*, 245 Minn. 130; 71 N.W. 2d 865, and *Rushton* v. *Winters*, 331 Pa. 78; 200 A. 60.

Relative to the affidavit of Aaron Starobin, an attorney in the office of petitioner's attorney, and especially in view of the emphasis placed on this affidavit by the Court of Appeals, it can be stated that the said Aaron Starobin examined this chaise longue chair with the express intention to notice what caused the leg to pull out, and, therefore, that was the reason that the metal legs attached to the stool portion could be seen by him to swing out. There is nothing in his affidavit that his body or head was in exactly the same position as that of petitioner's when he observed the leg of the chair to swing out.

Petitioner further urges that the Court of Appeals was in error in its definition of active and passive negligence. The Circuit Court of Appeals refers to the language of 65 C.J.S. 496, and came to the conclusion that although the facts indicate that the defendants in the case at bar were negligent in failing to repair the longue before the acci-

dent, such omission is passive neligence, and is not actionable where the relation of licensor and licensee exists, as in this case.

It is petitioner's contention that active negligence can be more than a positive act, but, it can also mean a failure of duty to act when one has knowledge of a situation involving risk to another. In the case of *Brindson* v. *Chicago & N.W. R. Co.*, 144 Wis. 614; 129 N.W. 664, it is stated that this condition of the planks made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them. The fact that active negligence can also constitute an omission to act, is emphasized in *Ward* v. *Avery*, 113 Conn. 394, 155 A. 502, where it is stated that the defendant, knowing of the presence of the plaintiff, who was a mere licensee, was under a duty to use ordinary care to avoid injuring her by a positive act of negligence or a failure of duty, the equivalent of such an act, and it could be reasonably found that failure to give warning of a slippery floor was a breach of this duty.

In Vol. 65 C.J.S., page 322, active and passive negligence are defined as distinguishable from each other. The term, "active negligence" as properly used, denotes some positive act or some failure in a duty of operation which is the equivalent of a positive act, and "passive negligence", the failure to do something that should have been done.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals' opinion below is in conflict with the rules of this Court and other Circuit Courts of Appeals on important questions of Federal Law, and is further in conflict with Federal Rule 56(c) of Federal Rules of Civil Procedure; and that the effect of the decision of the Circuit Court of Appeals is to cause confusion and uncertainty in the law with resulting loss of substantial justice to citizens of the United States, and will increase rather than decrease litigation in United States Courts of Review, unless the supervision and correcting authority of this Court is brought into use by granting the writ of certiorari.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit and that on such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

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Dated: May 12, 1958
BERTRAM J. HOFFMAN
Of Counsel

APPENDIX A

OPINION

IN THE

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12160

No. 12160 SEPTEMBER TERM, 1957 JANUARY SESSION, 1958.

ANN WARNER,
Plaintiff-Appellant,
v.
LEO LIEBERMAN and ELEANOR LIEBERMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

March 3, 1958

Before FINNEGAN, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiff, Ann Warner, sued Leo and Eleanor Lieberman, defendants, for damages occasioned by the alleged negligence of the defendants in the care and maintenance of a chaise longue[1] which belonged to defendants, and which was on their premises. Defendants were the hosts and plaintiff was their guest. The district court sustained defendants' motion for summary judgment and entered judgment dismissing the action on the merits,[2] from which this appeal has been taken. Error is charged in the granting of the motion for summary judgment, in considering which the district court had before it the pleadings, various depositions and affidavits.

[1] Herein called "lounge" or "lounge chair".

[2] 154 F. Supp. 362.

Beginning July 1, 1956, plaintiff was a gratuitous house guest of defendants, she being a sister of defendant Leo Lieberman. On July 12, 1956, plaintiff sat on the chair portion of the lounge in the yard of defendants. Defendant Leo was grilling steaks and defendant Eleanor was in the house. The lounge had never previously been used by plaintiff nor had she ever observed anything wrong with it. Leo called for her to come and eat. Plaintiff pushed herself off the lounge and started to walk around the front of it. She had taken only a step or two when she fell. As plaintiff sat on the lounge, she could not notice that a leg was loose. As she pushed the lounge in getting up, she caused the leg to turn in a swivel or clockwise action and pull away from the lounge so that as she was walking around to the front, it caught her right leg and tripped her. At the time plaintiff was seated on the lounge its leg was in a normal position. In plaintiff's affidavit, she sets forth there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped.

On August 20, 1957 one of plaintiff's attorneys examined the lounge. It appeared that there were three screws missing from the stool portion; that originally the front legs were attached by four screws, two on each side, and that, at the time of his examination, only one screw remained, which was on the right-hand side; that from a sitting position on the stool when the legs were pushed below it, one would not know that it was unsafe; that, upon standing up and pushing the lounge to one side in order to get up, the metal legs attached to the stool portion *could be seen* to swing out in a clockwise fashion and could easily cause one to trip.

During the winter prior to the accident, the lounge had been stored in the basement; prior to storing Leo had noticed the defective front leg with the bolts missing; when he took it out in May or early June, the front portion of the front leg was not fastened to the footstool portion of the lounge; on the left front side a screw and a bolt were missing; if the stool portion was pushed

slightly, the support leg would come loose; he knew a person could fall on the leg that was loose and that it would move when a person was either about to sit on it or was in the process of getting up from it; he knew that the lounge was dangerous, but he never told plaintiff that fact, and although he knew someone could fall, he did not believe anyone would be badly hurt.

Eleanor knew there were several screws missing from the lounge in the summer of 1956 and prior to the accident. She and the child of defendants used the lounge during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the lounge before plaintiff's accident. Eleanor did not see the legs of the lounge protruding beyond the front or side of the lounge before the accident, although she did see the legs protruding after the accident. Prior to the accident, Eleanor had used the chair carefully.

Do these facts, considered in a light most favorable to plaintiff, establish actionable negligence on the part of defendants?

The substantive law of Wisconsin applies to this case.

The general rule is that where a guest is invited to come into the premises of the host for social purposes, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply. *Greenfield* v. *Miller*, 173 Wis. 184, 180 N.W. 834. Where the relation of licensor and licensee exists, a licensee can recover only for the setting of a trap by, or for active negligence of, the licensor, *ibid.* 190.

In *Leuko* v. *Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, it was held that a mere licensee on private property takes the premises as he finds them and that the owner owes him no duty save to refrain from active negligence rendering the premises dangerous. Active negligence includes the maintenance of a hidden trap, as in *Meyer* v. *Menominee & M. L. & T. Co.*, 151 Wis. 279, 138 N.W. 1008, a pitfall as in *Brinilson* v. *Chicago & N.W. R.*

Co., 144 Wis. 614, 129 N.W. 664, or a partly concealed, open and unprotected straiway to a lower level, near a point at which an elderly customer was invited to go when she came into defendant's hardware store, as in *Lehman* v. *Amsterdam Coffee Co.*, 146 Wis. 213, 131 N.W. 362.

The licensor does owe to a licensee a duty to refrain from acts of active negligence rendering the use of the premises dangerous to the use of licensee. *Masek* v. *Bubenheimer*, 229 Wis. 194, 281 N.W. 924. In the *Masek* case it appeared that defendant drove a pipe with sharp rough edges into the ground, so that its top was only eight inches above the ground and quite incapable of being seen in the nighttime, without notifying plaintiff or her husband, who were tenants in plaintiff's building on said premises, and plaintiff was injured when she struck her foot against the pipe in the dark. The court held that whether the defendant was guilty of active negligence was for the court to determine under all of the circumstances.

We must not lose sight of the distinction between active negligence and passive negligence. Therefore, the language of 65 C.J.S. 496 is in point:

> "* * It follows that, as a general rule, the owner or person in charge of property is not liable, as for negligence, for injuries to licensees due to mere defects or dangers in the condition of the property or premises, or, as it has been expressed, due to passive negligence or acts of omission."

Undoubtedly the facts indicate that defendants were negligent in failing to repair the lounge before the accident. Such omission is passive negligence, which is not actionable where the relation of licensor and licensee exists, as in this case. In such a situation a licensee cannot recover for injuries sustained as the result of the licensor's failure to exercise ordinary care, *supra* 3.

Plaintiff in this court defines a trap as "a hidden danger lurking upon the premises which may be avoided if known." If we accept this definition and apply it to the occurrence which resulted in plaintiff's injury, we find

that, having arisen from the lounge, plaintiff was walking around to the front of it when she fell because her foot became entangled in a loose leg of the lounge which was pushed to the west and north as she got off the lounge. This all occurred in daylight. The protruding leg obviously was clearly apparent as she walked toward it and was tripped over it, was not hidden or lurking and was, therefore, not a trap. Had she been injured by a collapse of the lounge while she sat on it, a different question would have been presented.

We hold that the facts, under Wisconsin law, support the finding and judgment of the district court. There will be an affirmance here.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

JUDGMENT

United States Court of Appeals
for the Seventh Circuit

Pursuant to the Order of the Court entered herein on the 19th day of September, 1957, and upon all the records, files and proceedings herein, and on motion of John F. Zimmermann and Shaw, Muskat & Paulsen, attorneys for the defendants, it is

Adjudged, that the complaint of the plaintiff and the above entitled action be and the same are hereby dismissed on the merits, with costs to the defendants.

Dated, this 19th day of September, 1957.

By the Court,
Dale E. Ihlenfeldt
Clerk

APPENDIX C

OPINION OF UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

(Not Printed)

Pursuant to Rule 23 (i) we have not printed the Opinion of the United States District Court, Eastern District of Wisconsin, since we have submitted nine copies of the Record, and the Opinion is printed at pages 36 to 45, inclusive, of the Record.